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Paul W. Werner

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# Antisuit Injunctions Under the Complex Litigation Proposal: Harmonizing the Sirens' Song of Efficiency and Fairness with the Hymn of Judicial Federalism and Comity

## I. INTRODUCTION

Travelling along the western coast of Italy, ancient voyagers confronted a subtle danger embodied in alluring form: the Sirens. Sweetly singing their seductive song, the Sirens compelled all who heard their sound to draw near their reef-surrounded isle.<sup>1</sup> Those succumbing to the Sirens' song perished as their boats were wrecked on the submerged reefs surrounding the island. Others escaped this fate, however, either by countering the Sirens' song with equally compelling strains of their own or by blocking off the sound itself.

Although the Sirens and their song are no longer heard, a new sirens' song has sounded forth with the recent adoption of the American Law Institute's Complex Litigation Proposal.<sup>2</sup> Surveying the morass of modern complex litigation, the Institute trills forth its song, more calm and calculatedly logical than sweet and seductive, promising efficiency and fairness—with concomitant benefits for all—through consolidation of complex cases. Rather than leading to their destruction, those giving heed to this modern sirens' song are lulled into abandoning or subordinating to concerns of efficiency and

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1. Historic accounts and drawings suggest that the Sirens were sort of an aquatic Madonna. Cf. ANNA RUSSELL, *The Ring of the Nibelungs (An Analysis)*, on THE ANNA RUSSELL ALBUM (Sony Masterworks 1972) (describing Wagner's Rhine Maidens as "aquatic Andrews Sisters").

2. In 1985, the Institute commissioned the Preliminary Study on Complex Litigation. The study focused its efforts on two basic issues: (i) whether the Institute's efforts could actually alleviate problems associated with complex litigation; and (ii) how the problems of complex litigation potentially could be assuaged. This preliminary study developed into THE COMPLEX LITIGATION PROPOSAL, the final draft of which was adopted by the American Law Institute in 1994. AMERICAN LAW INSTITUTE, COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS 1 (1994) [hereinafter COMPLEX LITIGATION PROPOSAL].

fairness other values implicated by complex litigation, including the principles of comity and federalism.

One area in which the tug of efficiency and fairness is strongly felt is in the Complex Litigation Proposal's Antisuit Injunction provision, section 5.04. Under this section, a federal transferee court<sup>3</sup> may automatically enjoin ongoing state court proceedings whenever an injunction would "foster the overall objectives of [the] proposal."<sup>4</sup> Through linking issuance of injunctions to furtherance of the Proposal's efficiency and fairness objectives, the Proposal implicitly ignores two principles traditionally restraining issuance of otherwise proper injunctions: comity and federalism. Because an antisuit injunction will so frequently be necessary—or at least seem so—to facilitate consolidation and to achieve a satisfactory level of efficiency and fairness, the failure to expressly include considerations of comity and federalism in the calculus governing issuance of an injunction will directly result in their subordination. Although the Proposal Reporter reassuringly states that considerations of comity and federalism have their place in the calculus, the Proposal's "blackletter" rules governing injunctions fail to account for either principle. This Comment proposes to remedy this deficiency by offering a decisional framework accounting for both efficiency-fairness and comity-federalism considerations.

Harmonizing the Proposal's efficiency-fairness objectives with federalism-comity principles, which underlie the traditional federal court reluctance to issue injunctions, avoids the evils of adhering solely to either an efficiency-fairness based or a comity-federalism based regime. On the one hand, a strictly comity-federalism based regime, operating to severely restrain injunctions, would frustrate legitimate attempts to alleviate the patent systemic, individual, and societal ills posed by modern complex litigation. On the other hand, a strictly efficiency-fairness based regime, operating to freely issue injunctions, would strike at fundamental values preserved by the restraints comity and federalism impose on enjoining state court proceedings. Harmonizing of the sirens' song of efficiency

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3. Although § 5.04 applies to federal and some state transferee courts, this Comment will focus solely on federal transferee courts operating under this provision.

4. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 reporter's notes to cmt. c at 271.

and fairness with the hymn of judicial comity and federalism would not only avoid such unfortunate results, but also result in a beneficial synthesis of efficiency-fairness and comity-federalism objectives.

The purpose of this Comment is to suggest both the need for and methods of attaining harmonization of efficiency-fairness objectives with comity-federalism principles. First, this Comment will review the two competing considerations, highlighting that both represent equally weighty and consequently valid concerns. Second, this Comment will suggest how the Proposal's current framework may be adapted to account for both sets of considerations through an exercise of principled discretion.

As background for those unacquainted with the Complex Litigation Proposal, part II provides a brief overview of the Proposal, including a discussion of the problems sought to be alleviated through consolidation, an analysis of the proposed methods for achieving consolidation, and a summary of the efficiency and fairness policies furthered by consolidation. Part III reviews the interrelation between the Anti-Injunction Act and the Antisuit Injunction provision, surveying the operation of each. Part IV proposes a method by which federal transferee courts may harmonize efficiency-fairness objectives with the principles of comity and federalism through a principled exercise of their equitable discretion when issuing injunctions. Lastly, Part V concludes that, because equally weighty considerations support adherence to the efficiency-fairness objectives of the Proposal as well as the comity-federalism principles underlying the Anti-Injunction Act, a federal transferee court must actively seek to reconcile the two through a principled use of its equitable discretion.

## II. THE AMERICAN LAW INSTITUTE'S COMPLEX LITIGATION PROPOSAL: AN OVERVIEW

Over the past several decades, a new style of litigation has emerged onto the American legal scene. Courts and commentators have descriptively named it "complex litigation." Such litigation is typified by multiple parties filing an assortment of related claims in various fora.<sup>5</sup> Responding to

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5. For the working definition of "complex litigation" adopted by the American Law Institute in its COMPLEX LITIGATION PROPOSAL, see *infra* part II.A.

this development and the problems perceived to arise out of complex litigation, the American Law Institute undertook an investigation of complex litigation that has resulted in both a full review of this area of the law and a proposal for statutory reforms.<sup>6</sup> In 1988, the Institute commissioned the Complex Litigation Proposal<sup>7</sup> after concluding that the Institute could assist in resolving problems of complex litigation.<sup>8</sup> During the next five years, the Proposal investigated and developed broad-based proposals to resolve the various problems posed by complex litigation.<sup>9</sup> In 1993, the results of the Proposal's efforts were submitted to and approved by the general membership of the American Law Institute.

This section will summarize the efforts of the Complex Litigation Proposal, presenting first an analysis of what types of cases "complex litigation" comprehends and the impact such

6. See *supra* note 2.

7. Throughout the remainder of the text of this Comment the Complex Litigation Proposal will be referred to as either "the Proposal" or "the Complex Litigation Proposal."

8. The Proposal viewed its efforts as embracing three specific goals: (i) understanding the nature of lawsuits involving multiple parties; (ii) identifying the distinctive features of such lawsuits; and (iii) providing the Institute with techniques for alleviating the problems such lawsuits create. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 3.

9. The Proposal conducted its efforts in three discrete phases. First, the Proposal examined in greater depth the problems posed by modern complex litigation and developed suggestions for transferring and consolidating related complex cases within the federal system. Next, the Proposal developed transferal and consolidation techniques for related complex cases arising in both federal and state courts. Lastly, the Proposal developed proposals for consolidating related complex cases in a state court forum, including the transfer of federal cases into a state transferee forum, and a proposed federal choice of law code to be applied when cases were consolidated in a federal court. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 1-2. For an examination of the proposed transfer and consolidation procedures, see *infra* part II.B.

The Proposal developed these procedural proposals against the backdrop of the following goals:

First, basic principles of federalism and their implications as to the respective roles of state and federal courts must be respected. Second, new business should not be added to federal court dockets without a demonstrated need for doing so. . . . Third, and perhaps most important, the fundamental procedural rights of litigants must not be compromised.

COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 5-6. Some have suggested that the Proposal has failed to reconcile its proposals with these goals. See, e.g., Edward Brunet, *The Triumph of Efficiency and Discretion over Competing Complex Litigation Policies*, 10 REV. LITIG. 273, 278-79 (1991) (suggesting that the proposals set forth in the Complex Litigation Proposal permit efficiency principles to triumph over competing values such as federalism and litigant fairness).

litigation has on the parties, the judicial system, and society in general. The discussion then turns to both an analysis of the procedural reforms that the Institute has adopted and a review of the policies served by the Proposal's reforms.

*A. Background: Problems Posed by Modern Complex Litigation*

Although the term "complex litigation" is broad enough to include a variety of concepts,<sup>10</sup> as used in the Proposal, the term "refers exclusively to multiparty, multiforum litigation . . . characterized by related claims dispersed in several forums and often involving events that occurred over long periods of time."<sup>11</sup> Litigation falling within the scope of the Proposal's definition is not limited to one or a few areas of the law. Rather, complex litigation may occur in almost any area of substantive law.<sup>12</sup> Although complex cases may result from a variety of factual scenarios and sound in many different areas of the

10. "[T]he term sometimes is used to refer to litigation that concerns complex issues even if the dispute takes place only between two parties in a single forum." COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 7. Further, the term would certainly also apply to litigation that gives rise to a multitude of claims, crossclaims, counterclaims, and/or petitions for intervention or certification of classes or partial classes. For an example of how easily litigation embracing all these aspects of complexity can spring up, see John H. Lowrie, Note, *Air Crash Litigation and 28 U.S.C. Section 1407: Experience Suggests A Solution*, 1981 U. ILL. L. REV. 927, 927-28 (describing the "[l]arge scale, complex litigation [that] invariably results from a commercial air crash").

11. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 7; cf. MANUAL FOR COMPLEX LITIGATION (SECOND) § 20.11, at 7 (1985) (suggesting a somewhat broader scope for "complex litigation").

12. Thus, an early congressional investigation concluded that the potential for complex litigation arose "not only [in] civil antitrust actions but also, common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others." EMANUEL CELLER, TRANSFER OF PRETRIAL PROCEEDINGS IN MULTIDISTRICT LITIGATION, H.R. REP. No. 1130, 90th Cong., 2d Sess. 3 (1968). After completing its own investigation of complex litigation nearly 20 years later, the Proposal reached a similar conclusion:

Complex cases may arise under state or federal law and in the courts of either system. They are generated by a variety of circumstances—from a single mass disaster such as the collapse of a Hyatt Hotel skywalk, from myriad individual contacts with a hazardous product such as asbestos, or from allegations of antitrust violations committed by one of the world's largest corporations or a number of small ones.

COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 7. For examples of the meaning implicated by "complex litigation," see, e.g., *In re Asbestos Sch. Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984) (asbestos litigation); *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982) (DES litigation); *In re Repetitive Stress Injury Cases*, 142 F.R.D. 584 (E.D.N.Y. 1992).

law, complex cases share two distinctive features. First, complex cases involve the litigation of nearly identical issues of law in multiple fora. Second, this relitigation of identical issues produces wasteful expenditure of judicial, litigant, and societal resources.<sup>13</sup> These twin aspects of complex litigation (the relitigation of similar issues and the concomitant wasteful expenditures of limited resources)<sup>14</sup> are aggravated by increased filings of such cases.<sup>15</sup> The problems caused by relitigation of identical issues and expending limited resources may be classified into two broad categories: (i) transactional and economic inefficiency, and (ii) litigant injustice.<sup>16</sup>

First, complex litigation produces transactional and economic inefficiencies affecting not only those directly engaged in the complex litigation but also other users of the court system, as well as society in general. Massive court filings accompanying the prosecution of complex cases overburden court dockets,<sup>17</sup> thereby delaying proceedings for those involved with the

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13. COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 7; see also Alvin B. Rubin, *Mass Torts and Litigation Disasters*, 20 GA. L. REV. 429, 429 (1986) (noting that complex litigation "produce[s] high litigation costs . . . affect[ing] not only the litigants but other users of the court system; and their . . . costs affect all of society"); Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983) (describing complex cases as involving "costly and repetitive litigation").

14. [Complex litigation] presents one of the greatest problems our courts currently confront. Repeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, burdens already overcrowded dockets, delays recompense for those in need, results in disparate treatment for persons harmed by essentially identical or similar conduct, and contributes to the negative image many people have of the legal system.

COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 7.

15. See Rubin, *supra* note 13, at 429 (suggesting a variety of factors that have produced a "vast increase" in the number of complex cases being filed); see also Williams, *supra* note 13, at 324 ("[S]tate and federal trial judges are being inundated with mass filings of lawsuits by individual plaintiffs . . . . These cases are but the harbinger of the judiciary's role in an increasingly complex society . . . .").

16. This descriptive categorization highlights that these problems are the antitheses of the Proposal's overall policy objectives: (i) transactional and economic efficiency, and (ii) litigant fairness. See *infra* part II.C.

17. See, e.g., *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239, 240 & n.3 (S.D. Ohio), *appeal dismissed sub nom. Schreier v. Merrell Dow Pharmaceutical*, 745 F.2d 58 (6th Cir.) (Mem.), *mandamus to vacate certification*, *In re Bendectin Prods.* 749 F.2d 300 (6th Cir. 1984). After noting the more than 500 Bendectin claims filed and pending in its district alone, a district court calculated that resolution of just those claims could last nearly ten years. The court also concluded that resolution at just the trial level of all Bendectin claims might require the equivalent of "105 Judge years, i.e., one Judge for 105 years or 105 Judges for one year."

litigation itself as well as for others who have resorted to the judicial system for relief.<sup>18</sup> Moreover, the repeated litigation of identical issues of law requires the potentially unnecessary, and therefore wasted, expenditure of limited judicial, individual, and societal resources.<sup>19</sup>

Second, resolution of complex cases within the present judicial framework frequently produces inequitable results for both plaintiffs and defendants. Thus, plaintiffs who have been injured by essentially similar defendant conduct may receive vastly disparate treatment of their claims as each jurisdiction applies its own substantive and procedural rules, as well as its own precedents, to resolve the claims.<sup>20</sup> Likewise, nonconsolidated litigation of similar claims may lead to untimely bankruptcies of large institutional defendants who are confronted with "uncoordinated scrambles"<sup>21</sup> for assets to satisfy multiple compensatory and punitive damage awards.<sup>22</sup> Moreover, the delays resulting from complex litigation's transactional inefficiencies may not have an equal impact on all liti-

*Id.* at 240 n.3; *cf.* MANUAL FOR COMPLEX LITIGATION at vii (4th rev. ed. 1977) (quoting Chief Justice Earl Warren as observing that absent the coordination of civil antitrust litigation in the late 1960s "district court calendars throughout the country could well have broken down"). The procedural history of *In re Bendectin Prods. Liab. Litig.* alone suggests the impact that complex cases have on court dockets.

18. See Rubin, *supra* note 13, at 429; *cf.* FED R. CIV. P. 1 (noting that the Rules were adopted to promote the "just, speedy, and inexpensive determination of every action"). For plaintiffs, delay may affect the value of relief sought. See Marc A. Franklin, et al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 30 (1961) (noting that delay tends to "vitiate" any relief obtained and/or the ability to obtain it); see also *infra* text accompanying notes 20-25.

19. See Rubin, *supra* note 13, at 429. Although the precise cost of complex litigation is unknown, some have estimated that complex litigation comes with a multi-million or even multi-billion dollar price tag. *Cf.* COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 16-18; David Rosenberg, *The Dusting of America: A Story of Asbestos, Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693, 1694 (1986) (book review); Williams, *supra* note 13, at 328.

20. See D. HENSLER ET. AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TORTS 48-49 (1985); *cf.* Paul W. Werner, Comment, *The Straits of Stare Decisis and the Utah Court of Appeals: Navigating the Scylla of Under-Application and the Charybdis of Over-Application*, 1994 B.Y.U. L. REV. 633, 642 (noting that a fundamental principle of Anglo-American jurisprudence is the notion that similarly situated litigants should be treated alike).

21. Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 15 (1986).

22. See, e.g., *In re Johns-Manville Corp.*, Nos. 82 B 11, 656 to 82 B 11,676 (S.D.N.Y., filed Aug. 26, 1982) (initiating bankruptcy proceedings to resolve outstanding tort claims).



gants. While some parties may be able to await—or actually work to delay—the eventual resolution of claims, others may not be able to do so.<sup>23</sup> Similarly, the absolute cost of litigating a claim to final disposition may be so expensive that a party forgoes bringing the claim altogether<sup>24</sup> or is forced to settle the claim for much less than it is worth.<sup>25</sup>

In sum, the process of adjudicating complex cases within the current judicial framework produces not only transactional and economic inefficiencies but also litigant injustice, imposing a substantial burden on the judicial system, litigants, and society in general. Consideration of the problems presented by complex litigation counsels in favor of developing a set of procedures designed to alleviate such problems. The next section explores briefly the efforts of the Complex Litigation Proposal to accomplish this task.

### *B. Ameliorating Problems Posed by Complex Litigation: A Proposed Statutory Response*

After investigating the nature and extent of problems posed by modern complex litigation, the Proposal concentrated on developing techniques to alleviate those problems. The Proposal focused solely on developing procedures for adjudicating complex litigation rather than on proposing modification of the substantive law or on changing jury trial procedures in complex cases.<sup>26</sup> The remainder of this section summarizes briefly the efforts of the Proposal, looking first at the suggested procedures for consolidating multiparty, multiforum litigation occurring in either the state or federal courts. This section then turns to an analysis of the authority provided to courts handling the consolidated litigation and, lastly, this section concludes with an overview of the choice of law provisions to be applied by federal consolidation courts.<sup>27</sup>

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23. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 16. Thus, "someone who is not wealthy and is seriously injured may find that justice delayed is, indeed, justice denied." *Id.*

24. *Id.* "[F]orcing individual litigation of propositions that are true but expensive to demonstrate can be tantamount to barring the courthouse doors." *Id.*

25. See Franklin et al., *supra* note 18, at 30 (noting that delay has a "possible coercive effect that encourages victims to settle early for less than the full value of their claim, rather than to wait indefinitely for trial").

26. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 3-6.

27. For comprehensive treatment of the Proposal's proposals, see *id.* at chs. 3-6.

### 1. *Consolidation and associated procedures*

In order to achieve its objectives of alleviating the problems associated with complex litigation, as well as to promote its efficiency and fairness objectives,<sup>28</sup> the Proposal contemplates consolidating cases involving similar issues that have been filed in federal and state courts. The proposed procedures provide for three types of consolidation: (i) intrafederal consolidation, (ii) federal-state intersystem consolidation; and (iii) interstate consolidation. Each of these categories will be discussed in turn.

a. *Intrafederal consolidation.* When separate actions have been filed solely within the federal court system, the Proposal authorizes a proposed Complex Litigation Panel, a judicial body composed of federal judges, to make the initial determination of the amenability of the separate actions to consolidation.<sup>29</sup> The Complex Litigation Panel not only makes the decision whether to consolidate<sup>30</sup> but also, when necessary, where to transfer the consolidated cases within the federal court system.<sup>31</sup> The final decisions of the Complex Litigation Panel are not subject to review except by extraordinary writ.<sup>32</sup>

b. *Federal-state intersystem consolidation.* When separate actions sharing essentially similar issues of law have been filed in both federal and state courts, the Proposal provides the Complex Litigation Panel<sup>33</sup> with two alternative methods for

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28. See *infra* part II.C.

29. COMPLEX LITIGATION PROPOSAL *supra* note 2, § 3.02 (noting the composition and duties of the Complex Litigation Panel). For a general discussion of the Complex Litigation Panel, including its rationale, implementation, and composition, see *id.* at 62-70.

30. *Id.* § 3.01 (Standard for Consolidation) (providing criteria for determining whether separate actions should be consolidated; exempting the United States from consolidated proceedings when it is prosecuting antitrust or securities violations). Section 3.05 outlines the procedure for bringing a motion for consolidation before the Complex Litigation Panel as well as the procedure the Panel follows when reviewing such a motion. *Id.* § 3.05 (Panel Procedure). In order to prevent "inefficiency, delay, and unfairness" as well as the use of "transfer and consolidation for tactical advantage or to avoid unfavorable rules in the transferor court," motions for and rulings on consolidation must be made "as soon as possible." *Id.* § 3.03. (Timing of Transfer and Consolidation) (rules governing the timely making and disposition of motions for consolidation).

31. *Id.* § 3.04 (Standard for Determining Where to Transfer Consolidated Actions) (providing criteria governing the location(s) to which consolidated actions should be transferred).

32. *Id.* § 3.07(a) (Review).

33. See *supra* part II.B.1.a.

consolidating the actions.<sup>34</sup> On the one hand, the Complex Litigation panel may transfer most federal actions to a state court when certain prerequisites are satisfied.<sup>35</sup> On the other hand, the Complex Litigation Panel may remove state court actions to a federal consolidation court proceeding when the circumstances counsel in favor of such removal.<sup>36</sup> These Panel decisions are non-reviewable by other courts except by extraordinary writ.<sup>37</sup>

c. *Interstate consolidation.* Because complex cases are increasingly litigated solely in state courts,<sup>38</sup> the Proposal has proposed that states develop and adopt a uniform set of procedures to facilitate the transfer and consolidation of similar cases that have been filed in the courts of more than one state.<sup>39</sup> In order to facilitate the formulation and adoption of such procedures, the Proposal has developed a model for states to use.<sup>40</sup>

34. COMPLEX LITIGATION PROPOSAL, *supra* note 2, §§ 4.01, 5.01. Although efficient and fair disposition of complex cases filed in state and federal courts might be achieved by federalizing such cases, the Proposal rejected this method for achieving its efficiency and fairness objectives. *Id.* at 217-18.

35. *Id.* § 4.01 (Designating a State Court as a Transferee Forum for Federal Actions) (providing rules governing consolidation and transfer of federal actions in state courts). Section 4.01 provides that a transfer of federal actions should only occur when (i) a state court presents a superior forum for adjudicating the claims; (ii) the transfer will promote litigant fairness and the "interests of justice"; and (iii) events giving rise to the litigation occurred in that state and related litigation is located in the courts of the state. *Id.* Moreover, the "appropriate judicial authority" of the state must consent to the transfer. *Id.* Section 4.01 also provides that certain cases may not be transferred to state courts, including state cases removed to federal court, civil rights claims, and claims brought in or removed to federal court by the United States. *Id.*

36. *Id.* § 5.01 (Removal Jurisdiction) (providing criteria for consolidation of actions pending in state court and removal to federal court; prohibiting removal when parties and state judge object; authorizing removal of issues as well as whole claims; and permitting a state party to exempt itself from removal). A motion for removal may be made either by a party in the state proceedings or by the state court. *Id.* § 5.01(e). For the procedure for presenting and ruling on a motion for removal, see *id.* § 5.02 (Removal Procedure).

37. *Id.* § 3.07(a).

38. This is due, in part, to the narrow scope of federal diversity jurisdiction. See, e.g., *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (requirement of complete diversity); 28 U.S.C. § 1332(a) (1988) (amount in controversy).

39. COMPLEX LITIGATION PROPOSAL, *supra* note 2, §§ 2, 4.02 (Formulation of an Interstate Complex Litigation Compact or a Uniform Complex Litigation Act) ("[T]o facilitate the transfer and consolidation of related litigation pending in the courts of different states . . . consideration should be given to the formulation of an Interstate . . . Compact or . . . Act.").

40. *Id.* app. B at 455. In essence, the Proposal suggests that states adopt procedures similar to those used for intrafederal consolidation. See *supra* part

## 2. *Transferee court authority*

After consolidation is ordered, the actions are transferred to an appropriate transferee court for litigation. In order to promote efficient handling of the consolidated action, the Proposal provides transferee courts with additional powers, supplementing the general authority possessed by all courts.<sup>41</sup> Transferee courts are granted authority to manage and organize all aspects of the consolidated proceedings, including class certification and issue severance. Further, transferee courts enjoy both augmented personal jurisdiction over parties<sup>42</sup> and subject matter jurisdiction over consolidated and transactionally related claims.<sup>43</sup> Both federal transferee courts and state transferee courts to which federal cases have been transferred possess the authority to enjoin other proceedings that threaten to interfere with the disposition of the consolidated actions.<sup>44</sup> Lastly, federal transferee courts may notify certain nonparties that they not only have the right to intervene in the consolidated action but also will be bound by its determinations.<sup>45</sup>

## 3. *Choice of law provisions*

When consolidated actions have been transferred to a federal transferee court, the Proposal has developed a federal choice of law code to facilitate disposition of the consolidated

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### II.B.1.a.

41. Note, however, that the Proposal does not provide that all transferee courts will enjoy the same powers. The scope of a transferee court's supplemental powers depends on the type of court and the type of claims being transferred to it.

Thus, a federal transferee court disposing either of federal, see, e.g., *id.* at ch. 3 (intrafederal consolidation), or removed state cases, see, e.g., *id.* § 5.01 (removal), enjoys all the powers described in §§ 3 and 5, see, e.g., *id.* §§ 3.06 (general powers), 3.08 (personal jurisdiction), 5.03 (supplemental jurisdiction), 5.04 (antisuit injunctions), 5.05 (notice and preclusion).

A state transferee court adjudicating "remanded" federal cases, see, e.g., *id.* § 4.01 (consolidation in state court), possesses essentially all the powers of a federal transferee court except for the powers of notice and preclusion.

However, a state court that is exclusively adjudicating consolidated cases transferred from different state courts possesses only those powers conferred on it under an interstate litigation compact.

42. *Id.* § 3.08 (Personal Jurisdiction in the Transferee Court).

43. *Id.* § 5.03 (Supplemental Jurisdiction).

44. *Id.* § 5.04 (Antisuit Injunctions); see also *infra* parts III.B., IV.

45. *Id.* § 5.05 (Court-Ordered Notice of Intervention and Preclusion).

claims.<sup>46</sup> This choice of law code provides rules governing both procedural<sup>47</sup> as well as substantive aspects of adjudication.<sup>48</sup>

### C. Policies Advanced by the Complex Litigation Proposal

Several important public policy considerations are arguably advanced through the process of consolidating complex cases developed and advocated by the Complex Litigation Proposal.<sup>49</sup> Although these policies may be phrased in a variety of ways, they may be classified in two general categories: (i) efficiency interests; and (ii) litigant fairness interests.<sup>50</sup>

First, systematic application of the procedures for consolidating cases would produce increased transactional efficiencies that, in turn, would generate economic benefits. Combining cases which share identical issues in a single forum fosters greater convenience and economy of judicial and litigant efforts.<sup>51</sup> Further, consolidation reduces the aggregate judicial

46. *Id.* ch. 6 (Choice of Law); Fred I. Williams, Comment, *The Complex Litigation Project's Choice of Law Rules for Mass Torts and How to Escape From Them*, 1995 B.Y.U. L. Rev. 1081.

47. *See, id.* § 6.04 (statutes of limitations for state law claims).

48. *See, id.* §§ 6.01, 6.08 (conflicts of laws provisions governing which substantive law applies to resolve issues of liability sounding in tort or contract in consolidated cases); *id.* §§ 6.05-6.06 (conflicts of laws provisions governing awards of general and punitive damages).

49. *See id.* ch. 2; *see also* Peter J. Kalis, et al., *The Choice of Law Dispute in Comprehensive Environmental Coverage Litigation: Has Help Arrived from the American Law Institute Complex Litigation Project?*, 54 LA. L. REV. 925, 928 (1994) (noting efficiency-based objectives of the COMPLEX LITIGATION PROPOSAL); *cf.* FED. R. CIV. P. 1 (procedural rules should be construed "to secure the just, speedy, and inexpensive determination of every action"); *In re Repetitive Stress Injury Cases*, 142 F.R.D. 584, 585-88 (E.D.N.Y. 1992) (discussing considerations supporting consolidation of multiple actions into a single forum). *But see* Richard Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal*, 10 J.L. & COM. 1, 5-31 (1990) (conducting in depth inquiry into the Proposal and concluding that it may not further its announced goals of efficiency and fairness); Christine G. Clark, Comment, *The Sky is Falling—The ALI's Efficient Response to Courts in Crisis?*, 1995 B.Y.U. L. REV. 1019 (arguing that despite its announced objective of promoting efficiency, the procedures advocated by the Proposal may actually be less efficient than other existing procedures).

50. Some commentators have suggested that the objectives of efficiency and litigant fairness may be antithetical. *See, e.g.,* Brunet, *supra* note 9, at 275-85 ("A tension between efficiency and fairness clearly exists . . ."); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74 (criticizing the impact of aggregation of claims on individual litigants and suggesting that victims of mass disasters deserve the same access to judicial resources as a victim of an automobile accident, that is, individualized treatment).

51. *See In re Repetitive Stress*, 142 F.R.D. at 586-88. Thus, for example, consolidating cases can decrease costs by allowing for unified discovery of common

workload, thereby decreasing systemic delays and enabling the judicial system to render more justice for more people.<sup>52</sup> As Professor Chafee wisely noted: "In matters of justice . . . the benefactor is he who makes one lawsuit grow where two grew before."<sup>53</sup> Thus, collecting widely dispersed cases for unified treatment of common issues would produce transactional and economic efficiencies benefiting the judicial system, individual litigants, and society as a whole.

Second, the practice of consolidating cases involving identical issues, when combined with the efficiencies consolidation generates,<sup>54</sup> increases the probability of the fair adjudication of individual litigants' claims. Because the impact of delays in litigation does not fall equally on all litigants,<sup>55</sup> reducing the aggregate judicial overload with its concomitant delays alleviates such inequities. Further, consolidating cases may make the courts more accessible to those with either small claims or few resources.<sup>56</sup> Moreover, the unified disposition of similar issues decreases the potential for disparate treatment of those similarly situated.<sup>57</sup> Thus, consolidation avoids (i) inconsistent judgments for identical defendant conduct,<sup>58</sup> (ii) the denial of relief caused by defendant insolvency,<sup>59</sup> and (iii) the disruptive proactive filing of bankruptcy petitions as defendants face the threat of excessive and unpredictable damage awards.<sup>60</sup>

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issues and by producing a common "pooling of knowledge" that allows litigants to "be better informed and able to reach more equitable dispositions of cases more quickly and at less cost." *Id.* at 587. Moreover, there is the "sheer economy of not having to litigate the same matters twice." Rowe & Sibley, *supra* note 21, at 15.

52. *In re Repetitive Stress*, 142 F.R.D. at 585 ("[T]he interests of justice require that . . . a wasteful duplication of effort and expense of the litigants and the resources of the judicial system should be avoided by a transfer and a consolidation of one action with the other") (quoting *National Union Fire Ins. Co. v. R.H. Weber Exploration, Inc.*, 605 F. Supp. 1299, 1303 (S.D.N.Y. 1985)).

53. Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1297 (1932).

54. Despite the inherent tension some find between efficiency and litigant fairness, the two values seem to have a close, interrelated character. As this section suggests, advancing a policy of transactional and economic efficiency functions to serve fairness interests as well. Similarly, the problems generated by transactional and economic inefficiency in modern complex litigation operate to produce problems of litigant unfairness. See *supra* part II.A.

55. *Supra* note 23; see also Franklin et al., *supra* note 18, at 30.

56. See *In re Repetitive Stress*, 142 F.R.D. at 585-86; cf. FED. R. CIV. P. 23 (class actions).

57. Rowe & Sibley, *supra* note 21, at 15.

58. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 15 n.8; Rowe & Sibley, *supra* note 21, at 15.

59. See Rowe & Sibley, *supra* note 21, at 15.

60. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, at 16; see also *id.* at 15

In sum, consolidating complex cases serves to advance efficiency-based interests as well as to promote increased fairness for litigants. Such considerations of efficiency and litigant fairness not only support adopting consolidation techniques but also are important policies a court must consider when issuing an antisuit injunction.<sup>61</sup>

### III. THE ANTI-INJUNCTION ACT AND THE ANTISUIT INJUNCTION PROVISION: AN INTERACTIVE RELATIONSHIP

As previously noted, consolidating complex cases advances substantial policies implicating the efficiency and fairness of the entire litigation process. Despite its arguable benefits, some litigants may choose to forego consolidation, producing duplicative litigation.<sup>62</sup> When duplicative litigation interferes with the disposition of consolidated proceedings or impairs attainment of maximal efficiency and fairness, the transferee court should and does possess the authority to enjoin the duplicative actions.<sup>63</sup> Although federal transferee courts already possess the authority to enjoin state court proceedings,<sup>64</sup> the Anti-Injunction Act imposes strict limits on the exercise of that power.<sup>65</sup> The remainder of this Comment focuses on this tension between the power to issue injunctions and limits on that power and seeks to harmonize possible tensions between the commands of the Proposal's antisuit injunction provision and the restraints of the Anti-Injunction Act.<sup>66</sup> This

n.7 (collecting cases in which defendant entered bankruptcy because of potential damages claims); *supra* notes 21-22 and accompanying text.

61. *See infra* parts III.B., IV.

62. *See* COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 cmt. a.

63. "[I]f consolidation is to achieve the degree of efficiency and fairness sought . . . it is necessary to provide for situations in which parties refuse to cooperate and the result is duplicative litigation that interferes with the transferee court's ability to manage . . . the claims before it." *Id.* cmt. a at 263; *see also id.*, § 5.04.

64. *See* 28 U.S.C. § 1657 (1988). Such power is grounded in the All Writs Act, which provides federal courts with the power to "issue all writs necessary or appropriate in aid of their respective jurisdictions." *Id.* § 1651.

65. *Id.* § 2283. The focus of this Comment, and particularly these next two sections, is on harmonizing the policies both urging and restraining federal court interference with state court proceedings. Thus, only restraints on injunctions against state court proceedings are examined. For an example of the (lesser) restraints on federal court injunctions of other federal court proceedings, see *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952). *See also* 1A JAMES W. MOORE, ET AL., *MOORE'S FEDERAL PRACTICE*, ¶ 0.203[4] (1995) (discussing doctrine and collecting cases); *see generally*, Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987).

66. For a discussion of the possible tension between the antisuit provision

section first presents a discussion of the Anti-Injunction Act, including the public policies underlying and supporting adherence to its limitations. The discussion then turns to an examination of the Proposal's antisuit injunction provisions.

### A. *The Anti-Injunction Act*

Shortly after creating and defining the jurisdiction of the federal courts,<sup>67</sup> Congress enacted legislation prohibiting them from enjoining ongoing state court proceedings.<sup>68</sup> Although the precise reasons for this prohibition are unknown,<sup>69</sup> the Su-

and the Anti-Injunction Act, see Brunet, *supra* note 9, at 288 ("The . . . Complex Litigation Project creates a mechanism to issue injunctive orders; the Anti-Injunction Act generally prohibits injunctive orders."). *But cf.* Sherman, *supra* note 65, at 528-29 (suggesting that the Anti-Injunction Act "has often been viewed as overriding efficiency and fairness considerations that might otherwise justify an injunction against state litigation").

67. See U.S. CONST. art. III, §§ 1-2; Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

68. "And be it further enacted, that . . . a writ of injunction [shall not] be granted to stay proceedings in any court of a state . . ." Judiciary Act of 1793, ch. 22 § 5, 1 State. 334, 334-35 (1793). See *Mitchum v. Foster*, 407 U.S. 225, 231-32 (1972); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 285 n.3 (1970); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129 (1941); MOORE, *supra* note 65, ¶ 0.208[1]; CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4221 (1988).

69. "The history of this provision in the Judiciary Act of 1793 is not fully known." *Toucey*, 314 U.S. at 130; see also *Mitchum*, 407 U.S. at 232 (noting that the reasons for enacting the prohibition are "shrouded in obscurity"); *Atlantic Coast*, 298 U.S. at 285 (stating that "the reasons that led Congress to adopt this restriction on federal courts are not wholly clear"). After conducting an exhaustive review of the history surrounding its enactment, Justice Frankfurter suggested the following reasons for congressional enactment of the Judiciary Act of 1793: (i) a report made in 1790 by Attorney General Edmund Randolph suggesting possible changes to the Judiciary Act; and/or (ii) prevailing prejudices against current equity practices. A third possible reason—which Justice Frankfurter viewed as less influential in bringing about the modification of the Act—was the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which was handed down only two weeks before the Act was passed. In *Chisholm*, the Court held that states are subject to suit in federal court by non-state citizens. *Toucey*, 314 U.S., at 130-32. Others examining the same historical record have concluded that Congress did not intend to bar all stays of state court proceedings. See Howard G. Ervin III, Comment, *Federal Court Stays of State Court Proceedings: A Re-examination of Original Congressional Intent*, 38 U. CHI. L. REV. 612, 613 (1971) (suggesting that "Congress in 1793 did not intend to prevent stays . . . [rather] Congress specifically approved the use of the [common-law] writ of certiorari to stay state proceedings"). Yet others have said that Congress merely intended to prevent a Supreme Court Justice from enjoining state court proceedings while operating as a circuit justice. William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 332-33 (1978). See generally, MOORE ET. AL., *supra* note 65, ¶ 0.208[1] (providing general history of the Anti-Injunction Act); WRIGHT



preme Court has traditionally taken the view that the Act's purpose is to prevent "needless friction between state and federal courts."<sup>70</sup> Although the initial prohibition was couched in absolute terms,<sup>71</sup> Congress added, and the Supreme Court increasingly interpolated, exceptions into the text.<sup>72</sup> The process of judicial interpolation of exceptions and most of its fruits were abruptly abandoned by the Court in *Toucey v. New York Life Insurance Company*.<sup>73</sup> Rejecting the *Toucey* Court's reasoning and results, however, the drafters of the 1948 revision

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ET. AL., *supra* note 68, § 4221, at 494-95 (discussing and collecting articles on the history of the Anti-Injunction Statute); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1320-21 (3d ed. 1988) [hereinafter HART & WECHSLER'S] (discussing the history and purpose of the Anti-Injunction Statute and collecting cases and commentary).

70. *Okla. Packing Co. v. Okla. Gas & Elec. Co.*, 309 U.S. 4, 9 (1939); *Mitchum*, 407 U.S. at 233; *see also* *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977); *Atlantic Coast Line*, 398 U.S. at 286; *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225 (1954).

71. *See supra* note 69; *see also* *Mitchum*, 407 U.S. at 233; *Toucey*, 314 U.S. at 132.

72. Thus, over time, the Court had found that Congress had expressly or impliedly created an exception to the general prohibition against injunctions restraining state court proceedings in the following situations: (i) bankruptcy proceedings; (ii) removal of cases from state to federal courts; (iii) actions to limit the liability of shipowners brought under the provisions of the Act of 1851, 9 Stat. 635; (iv) federal interpleader proceedings; (v) federal proceedings brought under the Frazier-Lemke Farm Mortgage Act; (vi) federal habeas corpus proceedings; and (vii) federal actions under the Emergency Price Control Act of 1942. *Mitchum*, 407 U.S. at 234-35; *see also* HART & WECHSLER'S, *supra* note 69, at 1321-22; MOORE ET. AL., *supra* note 65, ¶ 0.208[2]; WRIGHT ET. AL., *supra* note 68, § 4221, at 497-99.

Moreover, the Court judicially inserted the following common-law exceptions into the anti-injunction statute: (i) a "res" exception, permitting a federal court to issue an injunction against a state court proceeding in order to protect its prior jurisdiction over a res; (ii) an exception permitting federal courts to enjoin the enforcement of judgments fraudulently obtained in state court proceedings; and (iii) the "relitigation" exception, permitting an injunction to issue restraining state court adjudication of issues litigated in a prior federal action. *See Mitchum*, 407 U.S. at 233-36; *Toucey*, 314 U.S. at 132-39; *see also* MOORE ET. AL., *supra* note 65, ¶ 0.208[2]; WRIGHT ET. AL., *supra* note 68, § 4221, at 497-99; HART & WECHSLER'S, *supra* note 69, at 1321-22.

For a discussion of the scope of exceptions under the current Anti-Injunction Act, *see infra* part III.A.1.

73. 314 U.S. 118 (1941). After noting that the anti-injunction statute stood for the proposition of "hands off" by the federal courts in the use of the injunction to stay litigation in a state court," *id.* at 132, a majority of the Court expressly rejected the judicially implied "relitigation" exception and impliedly rejected other judicially confected exceptions except for the "res" exception, *id.*; *see Mitchum*, 407 U.S. at 236 (noting that the *Toucey* Court's result and reasoning "cast[] considerable doubt upon the approach to the anti-injunction statute reflected in . . . previous decisions"); *see also* MOORE ET. AL., *supra* note 65, ¶ 0.208[2]; WRIGHT ET. AL., *supra* note 68, § 4221; HART & WECHSLER'S, *supra* note 69, at 1322.

of the Judicial Code rewrote the statute and included three exceptions to the general prohibition against restraining state court proceedings.<sup>74</sup> Although comprehensive treatment of the statute and the issues its interpretation have raised is beyond the scope of this Comment,<sup>75</sup> the remainder of this section provides a general discussion of the scope of the Act's restraint on federal equity powers and the public policies underlying the Act's limitations.

### 1. *The Anti-Injunction Act's statutory scope*

In its current form,<sup>76</sup> the Anti-Injunction Act provides

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74. See 28 U.S.C. § 2283 (1988). The Reviser's note accompanying the statute states that the broad purpose of the revision is to "restore[] the basic law as generally understood and interpreted prior to the *Toucey* decision." H.R. REP. NO. 308, 80th Cong., 1st Sess. A181-A182 (1947), reprinted in 28 U.S.C.A. § 2283 (Historical and Statutory Notes). Although a revision of the anti-injunction statute provided an excellent opportunity to bring clarity to this area of law, several commentators have suggested that the 1948 revision failed to do so. See, e.g., Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 760 (1977) ("[T]he anti-injunction statute is rife with inadequacies and ambiguities."); Comment, *Anti-suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471, 482 (1965) (suggesting, inter alia, that the revision created more problems than it resolved); Donald P. Barrett, Comment, *Federal Injunctions Against Proceedings in State Courts*, 35 CALIF. L. REV. 545, 563 (1947) (writing before enactment, the author presciently noted that "[this] revision does not appear to have [the] virtue" of resolving more problems than it creates). For a general discussion of the 1948 revision of the anti-injunction statute, see generally MOORE ET. AL., *supra* note 65, ¶ 0.208[3.—1], at 2310; WRIGHT ET. AL., *supra* note 68, § 4221; HART & WECHSLER'S, *supra* note 69, at 1322-23.

Although the drafters of the revised statute may have intended to permit a return to a more functional interpretation of the scope of and exceptions to the Anti-Injunction Act, the Supreme Court seems instead to have adhered to *Toucey*'s strict "hands off" approach when interpreting the statute and its exceptions. Thus, the court has stated:

[T]he present Act is an *absolute prohibition* against enjoining state court proceedings, unless the injunction falls within one of three *specifically defined* exceptions. . . . This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions . . . [which] should not be enlarged by loose statutory construction.

*Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286-87 (1970) (citations omitted) (first and second emphasis added). *But cf.* COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04, at 269 (noting that "[s]ince its codification in 1948, § 2283 has contained *three broad exceptions* under which antisuit injunctions may be issued") (emphasis added).

75. For detailed treatment of the statute and its exceptions, see MOORE ET. AL., *supra* note 65, ¶¶ 0.208-0.209; WRIGHT ET. AL., *supra* note 68, §§ 4221-4226.

76. The current version of the statute provides: "A court of the United States

that federal courts<sup>77</sup> may not issue an injunction<sup>78</sup> against state court<sup>79</sup> proceedings<sup>80</sup> unless the injunction falls within one of three exceptions.<sup>81</sup> An injunction must be (i) "expressly

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may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

77. The statute refers to a "court of the United States," which has been defined to include the Supreme Court, courts of appeals, and district courts. *See id.* § 451; *see also* WRIGHT ET. AL., *supra* note 68, § 4222, at 502 (listing federal courts excluded from the statute's prohibition by virtue of not falling within the statutorily defined term, "court of the United States").

78. The Supreme Court has never directly addressed whether the statutory prohibition against injunctions extends to declaratory judgments. Several lower courts and commentators, however, have suggested that it should. *See, e.g.*, WRIGHT ET. AL., *supra* note 68, § 4222, at 502-05.

79. Although whether a court is a state court is a relatively easy issue to resolve, the issue of whether a state court is a "court" within the meaning of § 2283, is, as Moore notes, "a complex one." MOORE ET. AL., *supra* note 65, ¶ 0.208[3.—1], at 2311. The complexity results from the Supreme Court's decision in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210 (1908), that the issue of whether a court is a state court within the meaning of § 2283 "depends not upon the character of the body but upon the character of the proceedings." *Id.* at 226. Thus, the approach mandated by the Court is a functional one, requiring consideration of the facts on a case-by-case basis. *See* MOORE ET. AL., *supra* note 65, ¶ 0.208[3.—1], at 2311 & n.7; WRIGHT ET. AL., *supra* note 68, § 4222, at 509-511 & nn.30 & 31.

Note, also, that although the statute phrases its prohibition in terms of injunctions against courts, the Court has stated that a federal court may not escape the impact of this ban merely by issuing an injunction against parties to a state court proceeding. *See, e.g.*, *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). This is so because "the proceedings of a state court . . . are as much interfered with when one of the parties to the suit is enjoined . . . as they are when the court itself is enjoined." Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 372 (1930).

80. The scope of the statutory term "proceedings" has been expansively construed, *see, e.g.*, *Hill v. Martin*, 296 U.S. 393, 403 (1935) ("That term is comprehensive. It includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process."), with its scope, thereby, reaching not only ongoing proceedings, *id.*, but also results of state court proceedings. *See, e.g.*, *County of Imperial v. Munoz*, 449 U.S. 54, 59 (1980). The statute, however, has no application before the proceedings actually begin. *See, e.g.*, *Mitchum v. Foster*, 407 U.S. 225, 226 (1972) (noting that § 2283 bars injunctions against "pending" state proceedings); *Dombrowski v. Pfister*, 380 U.S. 479 (1965). *See generally* MOORE ET. AL., *supra* note 65, ¶ 0.208[3.—1], at 2314-2315 & 0.208[3.—3] (discussing the scope of the statutory term "proceedings"); WRIGHT ET. AL., *supra* note 68, § 4222, at 505-509.

81. Although the Court has interpreted the statute to be an absolute ban on injunctions unless falling within an exception, *Atlantic Coast*, 398 U.S. at 286, the Court has, nevertheless, judicially confected two additional exceptions to the Act. The first exception applies when the United States or, in some situations, a federal agency requests an injunction. *See Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 224-26 (1957) (excepting United States from the coverage of § 2283 when acting as plaintiff); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 (1971) (extending

authorized by Act of Congress"; (ii) "necessary in aid of [the issuing court's] jurisdiction"; or (iii) "[necessary] to protect or effectuate [the court's] judgments."<sup>82</sup> Each of these exceptions will be reviewed in turn.

First, a federal court may enjoin state court proceedings when the court finds express congressional authorization for an injunction.<sup>83</sup> Despite the statute's requirement of an "express" authorization, the Court has not interpreted the statute to require that congressional authorization either mention the Anti-Injunction Act itself or state that a federal court is authorized to enjoin state court proceedings.<sup>84</sup> Rather, the Court has enunciated the following test for determining whether Congress has "expressly authorized" an injunction to issue: Congress has authorized an injunction when "an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding."<sup>85</sup> The relative clarity of this approach has been substantially undercut by more recent court decisions suggesting a narrower scope to this exception.<sup>86</sup>

the *Leiter* rationale to an instrument of the federal government); see generally MOORE ET. AL., *supra* note 65, ¶ 0.208[3.002] (discussing the inapplicability of the Act as a bar to injunctions sought by the United States). A second exception seems to be the principle evinced in *Ex parte Young*, 209 U.S. 123, 159-60 (1908), that a defendant in a state prosecution may obtain an injunction against state proceedings when federal constitutional rights are implicated by the state prosecution. See *Younger v. Harris*, 401 U.S. 37, 43 (1971) ("[A] judicial exception . . . has been made where a person about to be prosecuted in a state court can show that he will, if the proceeding in the state court is not enjoined, suffer irreparable damages.").

82. 28 U.S.C. § 2283.

83. *Id.*; see *Mitchum*, 407 U.S. at 237-38; see also MOORE ET. AL., *supra* note 65, ¶ 0.209[1] (discussing the "expressly authorized" exception); WRIGHT ET. AL., *supra* note 68, § 4224 (same). The implicit rationale for this exception seems to be that as Congress has imposed the ban, it may, in its discretion, determine when the prohibition should be lifted in order to effectuate its own legislative policies; cf. *Mitchum*, 407 U.S. at 233-34.

84. "In the first place, it is evident that . . . a federal law need not contain an express reference to that statute. . . . Secondly, a federal law need not expressly authorize an injunction of a state court proceeding in order to qualify as an exception." *Mitchum*, 407 U.S. at 237; see also *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U.S. 511, 521-23 (1955) (Warren, C.J., dissenting).

85. *Mitchum*, 407 U.S. at 238. Applying these principles, the Court has found that Congress has "expressly authorized" exceptions to the Anti-Injunction Act in the following areas: (i) bankruptcy proceedings; (ii) interpleader; (iii) removal; (iv) civil rights actions under 42 U.S.C. § 1983 (1988); (v) federal habeas corpus; and (vi) actions brought under the statute limiting the liability of shipowners. See *id.* at 233-43; MOORE ET. AL., *supra* note 65, ¶¶ 0.209[1.—1] to 0.209[1.—5].

86. See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977). In *Vendo* the

Second, a court may enjoin state proceedings when necessary to effectually adjudicate proceedings currently before it.<sup>87</sup> The Court has interpreted this exception in a narrow, stringent fashion<sup>88</sup> in spite of the more expansive view arguably found within the exception's own terms,<sup>89</sup> leading one commentator to conclude that this is "the most enigmatic of the three exceptions to the Anti-Injunction Statute."<sup>90</sup> Thus, the *Atlantic Coast* Court held that an injunction could not issue unless "federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."<sup>91</sup> The interpretive rule afforded by *Atlantic Coast* has fostered a narrow application of this exception by the Supreme Court as well as by the lower federal courts.<sup>92</sup> Consequently, although courts have uniformly held that this section permits courts in possession of a res to enjoin state court proceedings potentially interfering with the court's disposition of the res,<sup>93</sup> and while many

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Supreme Court substantially muddled its *Mitchum* rule for interpreting the "expressly authorized" exception, producing conflicting results among lower courts attempting to apply the newly minted *Mitchum-Vendo* test. See generally MOORE ET. AL., *supra* note 65, ¶ 0.209[1.—5], at 2332-34 (discussing the development of this exception after *Mitchum*); HART & WECHSLER'S *supra* note 69, at 1324-26.

87. 28 U.S.C. § 2283; see *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281 (1970); see also MOORE ET. AL., *supra* note 65, ¶ 0.209[2]; WRIGHT ET. AL., *supra* note 68, § 4425; see generally HART & WECHSLER'S, *supra* note 69, at 1326-27.

88. "[A] federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Atlantic Coast*, 298 U.S. at 2994. This interpretation is consistent with the Court's statements about the proper interpretation of the statute. See *supra* note 74.

89. See *Atlantic Coast*, 398 U.S. at 295 (noting that the "language is admittedly broad"); WRIGHT ET. AL., *supra* note 68, § 4225, at 530-33 (suggesting that the language of the exception and Supreme Court interpretations would permit a broader scope to this exception; and noting commentators concurring in this view).

90. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 278 (1980).

91. *Atlantic Coast*, 398 U.S. at 295.

92. MOORE ET. AL., *supra* note 65, ¶ 0.209[2], at 2339 & n.20 (collecting federal court cases adhering to the narrower scope of the exception suggested by the Court in *Atlantic Coast*).

93. See MOORE ET. AL., *supra* note 65, ¶ 0.209[2]; WRIGHT ET. AL., *supra* note 68, § 4225, at 528-30 & n.5 (noting that courts have uniformly found the res exception to fall within the scope of this exception and collecting cases so holding).

Federal courts have rebuffed, however, "novel attempts . . . to characterize . . . actions as *in rem* . . . [so as to] come within the umbrella of this exception."

courts have included federal court oversight of school desegregation cases within the scope of this exception,<sup>94</sup> it is unclear what other situations—if, indeed, any—might fall within the terms of this exception.<sup>95</sup>

Third, after a federal court has rendered judgment,<sup>96</sup> it may “protect or effectuate its judgment” by enjoining subsequent state court relitigation of issues or claims already fully litigated during the federal proceeding.<sup>97</sup> In effect, this exception removes the need for federal litigants to raise a claim of res judicata in subsequent state proceedings.<sup>98</sup> Recently the

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MOORE ET. AL., *supra* note 65, ¶ 0.209[2], at 2339 & n.22 (collecting cases demonstrating such “novel attempts”); *see also* WRIGHT ET. AL., *supra* note 68, § 4225, at 528-33 (analyzing scope of this exception and suggesting a broader interpretation that would include class actions within the res exception). For an example of such an attempt and the court’s rebuff, *see In re Federal Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir. 1982) (rejecting argument that a class action is an exception to § 2283). *But see In re Baldwin-United Corp.*, 770 F.2d 328, 336-38 (2d Cir. 1985) (concluding that injunction was properly granted under this exception when the class action proceedings were so far advanced that the need for court control over the action was similar to the need to have complete control over a res).

94. *See, e.g., Texas v. United States*, 837 F.2d 184, 186-87 n.4 (5th Cir. 1988) (holding that an injunction of a state court proceeding interfering with federal court supervision of school desegregation would fall within this exception); *Swann v. Charlotte-Meckleburg Bd. of Educ.*, 501 F.2d 383 (4th Cir. 1974).

95. Ironically, the class of cases intended by the revisers to fall within this exception—cases removed from state to federal court—has been fit into the “expressly authorized” exception instead. *See* 28 U.S.C. § 2283 (Historical and Revision Notes) (“[This section] make[s] clear the recognized power of the Federal courts to stay proceedings in State cases removed to the district courts.”); *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 640 (1977) (plurality opinion) (noting federal court power to enjoin state court proceedings following removal of the case to the federal court).

96. Because issuance of an injunction prior to the conclusion of the federal proceedings would eviscerate the long-standing policy permitting federal and state claims in personal actions to be adjudicated simultaneously, *see Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922), a federal court may not issue an injunction until a finalized judgment exists, *United States v. District of Columbia*, 654 F.2d 802, 810 (D.C. Cir. 1981).

97. 28 U.S.C. § 2283; *see, e.g., Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng’rs*, 398 U.S. 281, 288-94 (1970). The relitigation exception expressly overrules the central holding of *Toucey v. New York Life Ins. Co.*, 314 U.S. 118 (1941), which concluded that the Anti-Injunction Act prohibited the issuance of an injunction to restrain the relitigation of matters previously adjudicated in federal court. 28 U.S.C. § 2283 (Historical and Revision Notes) (“The exception[] specifically include[s] the words ‘to protect’ or ‘effectuate its judgments,’ for lack of which the Supreme Court held that the Federal courts are without power to enjoin relitigation . . . .”). For a discussion of the relitigation exception, *see generally* MOORE ET. AL., *supra* note 65, ¶ 0.209[3]; WRIGHT ET. AL., *supra* note 68, § 4226; HART & WECHSLER’S, *supra* note 69, at 1327-28.

98. Arguably, a party would find the cost, effort, and expense of litigating his rights in federal court to be worthless if the court could not enforce its judgment

Supreme Court has clarified the timing and scope of injunctions issued under the relitigation exception.<sup>99</sup> First, an anti-relitigation injunction may not issue after a claim of *res judicata* has been raised in and adjudicated by the state court.<sup>100</sup> Thus, the relitigation exception applies only when a party obtains an anti-relitigation injunction before either a claim of *res judicata* is raised in or decided by the state court.<sup>101</sup> Second, an injunction issued under the relitigation exception may only prevent relitigation of issues and claims actually decided by the federal court.<sup>102</sup> Thus, framing the scope of an injunction under this exception requires a careful examination of the federal court record to ascertain "what the earlier federal order *actually* said" rather than "what the order was intended to say."<sup>103</sup>

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against subsequent efforts by the losing party to obtain state court nullification of the federal decree—especially in light of limited Supreme Court appellate review of state court decisions. Because the issuance of an injunction is within the discretion of the federal court, a party may, however, be required to plead *res judicata* in a state court proceeding when doing so would not be unduly burdensome. *See* *Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1052, 1058 (6th Cir. 1977); *cf.* *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 157 (1988); *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (noting that "principles of equity, comity, and federalism . . . must restrain a federal court when asked to enjoin a state court proceeding," and suggesting that injunctions should not issue automatically merely because an exception exists); *see infra* note 135 and accompanying text (noting that an injunction need not issue merely because it may issue).

99. *See Chick Kam Choo*, 486 U.S. at 148-51 (discussing the permissible scope of an injunction); *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524 (1986) (discussing the timing of an injunction petition); *see also* MOORE ET. AL., *supra* note 65, ¶ 0.209[3] (analyzing the relitigation exception); *see generally* HART & WECHSLER'S, *supra* note 69, at 1327-28 (analyzing the relitigation exception).

100. *Parsons Steel*, 474 U.S. at 524; *see* MOORE ET. AL., *supra* note 65, ¶ 0.209[3]. This express limitation on the relitigation exception is a concomitant of the demands of the Full Faith and Credit Act: once a state court has rendered a decision on the *res judicata* issue, that determination is itself binding on parties before the federal court. *See* 28 U.S.C. § 1738 (1988) (Full Faith & Credit Act).

101. The timing rule laid down in *Parsons Steel* has led some to suggest that it creates incentives to forego a claim of preclusion in the state court in favor of immediately seeking an injunction in federal court, MOORE ET. AL., *supra* note 65, ¶ 0.209[3], at 2346 (quoting Professors Chemerinsky and Redish), and others to query whether this principle is likely to create more, rather than less, friction between state and federal courts, HART & WECHSLER'S, *supra* note 69, at 1328.

102. "[A]n essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings actually have been decided by the federal court." *Chick Kam Choo*, 486 U.S. at 148.

103. *Id.* at 148. For an example of such an analysis, *see* *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 288, 288-93 (1970).

## 2. Policies served by the Anti-Injunction Act

Although the primary reasons motivating Congress to enact the Anti-Injunction Act may be largely unknown and unknowable, several important policies are arguably served by the practice of not enjoining state court proceedings except in certain, narrowly defined situations.<sup>104</sup> Although phrased in a variety of ways, these policies fall within two general principles: (i) judicial comity; and (ii) judicial federalism.<sup>105</sup>

First, judicial comity is served by restraining federal courts from freely enjoining state court proceedings. As applied to a federal system of administering justice, judicial comity suggests that the courts of one sovereign "should be extremely reluctant to interfere in the administration of justice" by the courts of the other sovereign.<sup>106</sup> Adherence to this principle of non-interference by one court system with the operations of another avoids unnecessary, or at least reduces the magnitude of, conflict between two judicial systems.<sup>107</sup> Moreover, restraining the issuance of injunctions goes far to promote a more harmonious working relationship between courts frequently possessing jurisdiction over the same subject matters.<sup>108</sup> As Justice

104. See *Parsons Steel*, 474 U.S. at 518; *Mitchum v. Foster*, 407 U.S. 225, 228-36 (1972); *Younger v. Harris*, 401 U.S. 37, 43-45 (1971); *Atlantic Coast*, 398 U.S. at 285-87; *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 132 (1941); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985); Redish, *supra* note 74, at 760; David Mason, Note, *Slogan or Substance? Understanding "Our Federalism" and Younger Abstention*, 73 CORNELL L. REV. 852 (1982).

105. Although the principles of comity and federalism are treated here as analytically distinct concepts, they may in fact represent overlapping principles, see Shapiro, *supra* note 104, at 583, or, as Justice Black suggests, variations on a theme of "Our Federalism," see *Younger*, 401 U.S. at 44-45; *Atlantic Coast*, 398 U.S. at 285-87.

106. Allan D. Vestal, *Protecting a Federal Court Judgment*, 42 TENN. L. REV. 635, 669 (1975); see *Mitchum*, 407 U.S. at 230 (noting the "national policy forbidding federal courts to stay . . . state court proceedings except under special circumstances" (quoting *Younger*, 401 U.S. at 41, 44)); *Toucey*, 314 U.S. at 132 (stating that the Act "expresses on its face the duty of 'hands off' by the federal courts"); Mason, *supra* note 104, at 866-67 (concluding that "chief tenet" of *Younger* is that federal courts should not interfere with state courts unless necessary).

107. See *Mitchum*, 407 U.S. at 232-33 (quoting *Okla. Packing Co. v. Okla. Gas & Elec. Co.*, 309 U.S. 4, 9 (1939)); cf. Bator, *supra* note 104, at 620 (noting that "especially sensitive political nerves are likely to be touched if federal judges are free to enjoin . . . state court enforcement proceedings on the basis of claims which could be adjudicated in those proceedings").

108. "A sound conception of our federal system requires a federal court to withhold intervention with state procedure in the interest of maintaining harmony



Frankfurter sagely concluded, "[The anti-injunction statute] is an historical mechanism . . . for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject-matter."<sup>109</sup>

In addition to promoting judicial comity, the prohibition against enjoining state court proceedings advances principles of judicial federalism. Judicial federalism builds upon comity's tenet of non-interference, and establishes as its own "fundamental precept . . . [the belief] that the state and federal courts should be independent of one another."<sup>110</sup> Under the system of government established by the United States Constitution, both the national and state governments retained the right and authority to have their own judicial bodies operate essentially independently of the other when adjudicating legal controversies despite their frequently overlapping subject matter jurisdiction.<sup>111</sup> The Anti-Injunction Act is a necessary and natural result of and means for effectuating this constitutionally mandated federal-state judicial autonomy.<sup>112</sup> The Act preserves this constitutional independence of state judicial systems and permits the dual system to work effectively by establishing a line of demarcation that prevents potentially destructive federal court intervention into state court operations except in narrowly defined instances.<sup>113</sup>

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within the system." *Dresser Indus., Inc. v. Insurance Co. of N. Am.*, 358 F. Supp. 327, 329 (N.D. Tex. 1973) (citation omitted).

109. *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 378 (1939).

110. *Redish*, *supra* note 74, at 717; *see also* *Atlantic Coast Line R.R. v. Brotherhood of Eng'rs*, 398 U.S. 281, 287 (1970) (noting the "fundamental constitutional independence of the States and their courts").

111. *See Atlantic Coast*, 398 U.S. at 285-86.

112. *See id.* at 286-87; *see also* *Texas Employers' Ins. Ass'n v. Jackson*, 862 F.2d 491, 497-98 (5th Cir. 1988) (noting the Act to be a necessary concomitant of the dual system of federal and state courts) (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988)); *Brooks v. Barbour Energy Corp.*, 804 F.2d 1144, 1146 (10th Cir. 1986) (suggesting that the Act promotes the independence of state courts); *cf.* *Mason*, *supra* note 104, at 867 (suggesting that the policy guiding the relationship between state and federal courts rests on the federal system established by the Constitution).

113. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (stating that "[p]revention of frequent federal court intervention is important to make the dual system work effectively"); *Atlantic Coast*, 398 U.S. at 286 (noting that in order to make the dual system of courts function, it was necessary to "work out lines of demarcation between the two systems" and that the Act spells out some of these lines).

In sum, the Anti-Injunction Act's restraint on enjoining state court proceedings serves both to protect the independent authority of state courts and to promote a properly limited interference with the operation of state court systems.<sup>114</sup> These benefits not only counsel strict adherence to the terms of the Act, but also serve as countervailing factors a court must consider when reviewing a petition for an injunction falling within the scope of an exception to the Anti-Injunction Act.<sup>115</sup>

*B. The Complex Litigation Proposal's Antisuit Injunction Provision*

Although the procedures for and benefits of consolidation should prove sufficient to bring together all appropriate cases,<sup>116</sup> some may escape consolidation through either happenstance or intentional efforts to avoid consolidation.<sup>117</sup> Because

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114. Perhaps the best summation and effective explanation of the need for the principles advanced by a policy of federal court restraint was made by Justice Hugo Black in *Younger v. Harris*:

[The] underlying reason for restraining courts of equity from interfering . . . [is] the notion of "comity," that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interest, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States. It should never be forgotten that this slogan, "Our Federalism," born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future.

*Younger*, 401 U.S. at 44-45 (emphasis added).

115. See *infra* part IV.

116. See *supra* part II.B.

117. Accidental non-consolidation of transactionally related claims might result for one of two reasons: (i) the claims are filed after the Complex Litigation Panel has already consolidated and transferred claims; or (ii) the claims are filed before consolidation but the Complex Litigation Panel is unaware of the related claims. Purposeful nonconsolidation could result from any number of litigant motives, in-

failure to consolidate such cases may lead to duplicative litigation, wasted judicial resources, and litigant unfairness<sup>118</sup>—problems sought to be alleviated by consolidation<sup>119</sup>—the Proposal provides transferee courts with authority to enjoin transactionally related duplicative proceedings threatening to interfere with the efficient and equitable disposition of consolidated actions.<sup>120</sup>

Because the inherent power of federal transferee courts to issue antisuit injunctions would otherwise be constrained by the provisions of the Anti-Injunction Act, the Proposal proposes to have the antisuit provision operate within the “expressly authorized” exception.<sup>121</sup>

Section 5.04, the Antisuit Injunction provision of the Complex Litigation Proposal, provides<sup>122</sup> that a federal transferee court may enjoin transactionally related proceedings<sup>123</sup> in

cluding a desire to beat the transferee court to judgment by refiling a claim in state court after claim consolidation. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 cmt. a, at 263-64, 266 n.1.

118. See *supra* part II.A.

119. See *supra* part II.B.

120. For a discussion of the types of interference that might result from duplicative litigation of transactionally related claims, see COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 cmt. a, at 264-65.

121. See *supra* notes 83-86 and accompanying text. Because the standard for finding implied congressional authorization under the *Mitchum-Vendo* test is substantially unclear, see *supra* notes 84-86 and accompanying text, the Proposal has provided for explicit statutory authority in its model Complex Litigation Statute. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, app. A at 443; see also *id.* § 5.04 reporter's notes to cmt. b at 268 n.6 (suggesting need for explicit authorization in light of court refusals to permit injunctions under FED. R. CIV. P. 23(d)).

122. Section 5.04 provides:

(a) When actions are transferred and consolidated pursuant to § 3.01 or § 5.01, the transferee court may enjoin transactionally related proceedings, or portions thereof, pending in any state or federal court whenever it determines that the continuation of those actions substantially impairs or interferes with the consolidated actions and that an injunction would promote the just, efficient, and fair resolution of the actions before it.

(b) Factors to be considered in deciding whether an injunction should issue under subsection (a) include

- (1) how far the actions to be enjoined have progressed;
- (2) the degree to which the actions to be enjoined share common questions with and are duplicative of the consolidated actions;
- (3) the extent to which the actions to be enjoined involve issues or claims of federal law; and
- (4) whether parties to the action to be enjoined were permitted to exclude themselves from the consolidated proceeding under § 3.05(a) or § 5.01(b).

COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04.

123. Because an antisuit injunction against proceedings that are merely

state or federal courts when it concludes that (i) the litigation would impair its disposition of the consolidated actions and (ii) an injunction would further the efficiency and litigant fairness policies underlying consolidation.<sup>124</sup> When determining whether these two factors are satisfied, the Antisuit Injunction provision provides the transferee court with a non-exhaustive list of factors to be considered.<sup>125</sup> These factors include such considerations as (i) what stage of litigation the actions to be enjoined have reached; (ii) the substantive nature and degree of commonality shared by the various claims; and (iii) whether the parties to be enjoined were previously excused from consolidation.<sup>126</sup> After considering these factors and reaching the firm conclusion that an injunction will "foster the overall objectives of [claim consolidation]," the transferee court may issue an injunction.<sup>127</sup>

Although section 5.04 fails to provide any factors requiring the transferee court to consider the impact an injunction would have on the principles of federalism and comity,<sup>128</sup> the Reporter's notes suggest that such considerations are appropriate and should enter into the court's calculus when determining whether an injunction should issue.<sup>129</sup> The following sec-

transactionally related to the consolidated action may run against non-parties, § 5.04 effectively expands the current jurisdictional authority of federal courts when issuing such injunctions.

124. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04(a).

125. See *id.* § 5.04(b). Rather than attempt to list all relevant factors, the Proposal settled for a list containing—in its opinion—the most relevant factors for determining whether an injunction would be appropriate. However, the Proposal states that the determination of whether an injunction would be appropriate "depend[s] on a review of the circumstances of each case . . . requir[ing] the careful balancing . . . of the need for injunctive relief against the need to avoid being unduly intrusive." *Id.* § 5.04 reporter's notes to cmt. c at 271. For a discussion of additional factors a court should consider, see *infra* part IV.

126. See *supra* note 122. For a discussion of how these factors should govern a court's disposition, see COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 reporter's notes to cmts. c & d at 270-75; see also *infra* part IV.

127. COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04, reporter's notes to cmt. c at 271. Consideration of these factors is also relevant in determining the scope of any injunction to be issued against transactionally related proceedings. See *id.* at 265, 270-72.

128. This omission limns Professor Brunet's conclusion that, whereas the Anti-Injunction Act restrains injunctions because of federalism and comity concerns, the Antisuit Injunction provision of the Complex Litigation Proposal creates a tool for issuing injunctions because of efficiency concerns. See Brunet, *supra* note 9, at 285-90.

129. Thus, the Reporter suggests that, although not expressly included within the statute, "federalism notions . . . [neither] should be [n]or are ignored . . .

tion discusses how such an inquiry incorporating principles of federalism and comity might be framed and executed.

#### IV. HARMONIZING EFFICIENCY AND FEDERALISM: A PROPOSED DECISIONAL SCHEMA FOR ISSUING ANTISUIT INJUNCTIONS

Considerations of public policy support both consolidating complex cases and enjoining transactionally related proceedings threatening to impair both disposition of the consolidated actions and attainment of efficiency and litigant fairness objectives. Equally substantial considerations of judicial comity and federalism, however, counsel adherence to traditional restraints against enjoining state court proceedings. Thus, while the Proposal's policies of efficiency and fairness may counsel in favor of issuing an injunction, the principles of judicial comity and federalism may urge restraint. Consequently, a federal transferee court must stand ready to reconcile the conflicting policy directives underlying both the Complex Litigation Proposal and the Anti-Injunction Act in order to advance the one while preserving the other.<sup>130</sup> Although the Antisuit Injunction provision operates within an exception to the Anti-Injunction Act, theoretically permitting automatic issuance of an injunction restraining state court proceedings, traditional principles of federal court jurisdictional discretion permit a federal court to decline to issue an otherwise permissible injunction. Through applying this traditional discretion, a federal transferee court may reconcile the Proposal's demands of efficiency and fairness with the requirements of federalism and comity. This section first discusses federal court discretion and then suggests how and when such an exercise of principled discretion should be made.

Traditional principles of federal court jurisprudence suggest that federal courts may not decline to exercise that juris-

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Included in the calculus will be [such] concerns." COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 reporter's notes to cmt. b at 270; *see also id.* at § 5.04(a). But *see* Brunet, *supra* note 9, at 288-89 (suggesting that "managerial judges" applying the Proposal's balancing interest test will value efficiency more heavily than other values such as state sovereignty and federalism).

130. In terms of the metaphoric perspective adopted at the outset of this paper, *see supra* note 1 and accompanying text, a federal transferee court must be able to harmonize the competing sounds produced by the sirens' song of efficiency and fairness and by the judicial hymn of federalism and comity. *See supra* part I.

diction conferred by the Constitution.<sup>131</sup> As Chief Justice John Marshall declared:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.<sup>132</sup>

This principle, that federal courts may not decline to exercise the jurisdiction granted, rests squarely on the notion that, under the Constitution, the scope of federal jurisdiction to be exercised is textually committed to the discretion of Congress rather than to that of the Judiciary.<sup>133</sup>

Nevertheless, both members of the Court and commentators have suggested that equally orthodox principles of federal

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131. Justice Brennan has described this principle in near absolute terms as "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817 (1976); see also *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964) (noting that federal courts must exercise that jurisdiction properly granted them); *Meredith v. Winter Haven*, 320 U.S. 228, 237-38 (1943) (noting that federal courts should exercise the jurisdiction congressionally granted "subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess").

132. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (dictum); cf. *McClellan v. Carland*, 217 U.S. 268, 281 (1910) (chiding the lower court, which had stayed its own proceedings in favor of yet-to-be-filed state proceedings, for "practically abandon[ing] its jurisdiction over a case of which it had cognizance . . . [something] a Federal court may not do").

Although *Cohens* may have been the first Supreme Court expression of this near absolutist principle of jurisdiction, it has certainly not been the last. Thus, in *Chicot County v. Sherwood*, 148 U.S. 529 (1893), the Court affirmed that "the courts of the United States are bound to proceed to judgment . . . in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case . . . ." *Id.* at 534; see *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909) ("When a Federal court is properly appealed to . . . it is its duty to take such jurisdiction . . .") (citations omitted). But see *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) (suggesting that federal courts may have discretion to decline to adjudicate claims otherwise falling within their jurisdiction). See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

133. See *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989) (noting that the reason for this absolutist principle is the "principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction." (citing *Cline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922))).

court jurisprudence permit a federal court to decline to exercise its jurisdiction, especially when the request is for an exercise of its equitable powers. Thus, Justice Scalia has stated that although federal courts *do* have a duty to act on claims falling within their jurisdiction,

[t]hat principle does not eliminate however, and the categorical assertions based upon it do not call into question, the federal courts' discretion in determining whether to grant certain types of relief—a discretion that was part of the common-law background against which the statutes conferring jurisdiction were enacted.<sup>134</sup>

Because an injunction is an equitable remedy, a request for an injunction restraining state court proceedings falls precisely within this jurisdictional zone of discretion described by Justice Scalia. Thus, although an injunction may fall within an exception to the Anti-Injunction Act, an injunction need not automatically issue.<sup>135</sup> Rather, the court must make the decision to

134. *Id.* at 359; see also *Younger v. Harris*, 401 U.S. 37, 45 (1971) (noting that declining to issue an injunction is sometimes "the normal thing to do").

Whether federal courts may legitimately exercise principled discretion over their jurisdiction has attracted widespread debate. See Bator, *supra* note 104 (pro) (suggesting that federal courts have discretion in exercising jurisdiction); Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 72 (1984) (contra) ("Invalidating legislation because a court thinks it is unwise or would make judges work too hard would amount to a blatant—and indefensible—usurpation of legislative authority. . . . Yet, in a sense, the abstention doctrines amount to such usurpation."); Shapiro, *supra* note 104, at 545 (pro) (arguing that "suggestions of an overriding obligation . . . are far too grudging in their recognition of judicial discretion in matters of jurisdiction"); Michael Wells, *Why Professor Redish Is Wrong about Abstention*, 19 GA. L. REV. 1097, 1132 (1985) (pro) (arguing that "judge made rules restricting federal jurisdiction are not judicial usurpation of power, but are part of a common law of federal jurisdiction").

135. "Of course, the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 151, (1988); see *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263, 1274 (7th Cir. 1976) ("Although one of the exceptions . . . must exist before a federal court has power . . . the court has discretion to *exercise* that power once it exists. The power to enjoin state proceedings is discretionary . . .").

The principle that federal courts possess and should use discretion when issuing an injunction otherwise falling within an exception to 28 U.S.C. § 2283 has been widely noted. See, e.g., *Kerr-McGee Chem. Corp. v. Hartigan*, 816 F.2d 1177, 1181 (7th Cir. 1987) ("[I]f a statutory exception is triggered, the decision to issue an injunction lies within the discretion of the court . . ."); *Bechtel Petroleum v. Webseter*, 796 F.2d 252, 253 (9th Cir. 1986) (noting that the decision to enjoin is "committed to the discretion of the district court"); *First Nat'l Bank & Trust Co. v. Lawing*, 731 F.2d 680, 682-83 (10th Cir. 1984) (noting that a court must consider the principles of equity, comity, and federalism when "determining whether to

issue an injunction in light of those traditional principles restraining injunctions against state court proceedings: comity and federalism.<sup>136</sup> Legitimate, orthodox principles of federal court discretion, then, permit a federal transferee court to decline to enjoin duplicative state court proceedings. Consequently, although an antisuit injunction may technically be permissible under section 5.04, a federal transferee court may use its discretion to deny the injunction, thereby advancing and protecting federalism and comity policies.

Nevertheless, the manifold problems created by complex, duplicative litigation coupled with the policies sought to be advanced by consolidation strongly counsel against lightly declining to enjoin duplicative proceedings. Merely to concede discretion is not to permit its unbridled exercise.<sup>137</sup> Rather, a

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exercise [its] discretion by granting the injunction once one of the statutory exceptions has been met"); *WRIGHT ET. AL.*, *supra* note 68, § 4226, at 551-55 (discussing this principle that "[t]he mere existence of power (to enjoin) does not mean that this power is to be exercised as a matter of routine"); *see also* *First Ala. Bank v. Parsons Steel, Inc.*, 825 F.2d 1475, 1483 (11th Cir. 1987) ("[T]he fact an injunction may be permissible under an exception . . . does not mean that . . . an injunction is appropriate . . ."); *cf.* *WILLIAM SHAKESPEARE, MEASURE FOR MEASURE* act 2, sc. 2, at lines 107-09 ("O, it is excellent to have a giant's strength, but it is tyrannous to use it like a giant.") *But see* *Tampa Phosphate R.R. v. Seaboard Coast Line R.R.*, 418 F.2d 387, 396 (5th Cir. 1969) ("As a general rule . . . [this principle] will not bar a federal injunction where there are circumstances which bring the case within one of the exceptions to § 2283.") (citation omitted); *see also* *WRIGHT ET. AL.*, *supra* note 68, § 4226, at 552-53 (noting the frequent practice of "virtually automatic injunctions" in the relitigation exception area and collecting cases and commentary).

136. "In concluding [that an injunction falls within an exception], we do not question or qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster*, 407 U.S. 225, 243 (1972); *see* *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 526 (1986); *see also* *First Alabama Bank*, 825 F.2d at 1482-86 (analyzing whether a district court's issuance of injunction was appropriate in light of the "general principles of equity, comity, and federalism"); *Kerr-McGee*, 816 F.2d at 1181-82 (quoting *Mitchum v. Foster* for the proposition that principles of equity, comity, and federalism must inform the court's decision whether to issue an injunction); *First Nat'l Bank & Trust*, 731 F.2d at 683; *MOORE ET. AL.*, *supra* note 65, ¶ 0.208[3.—1], at 2312-13 & n.9 (collecting cases). For an interesting suggestion of the role that these principles of comity and federalism have played in the past, *see* *Mayton*, *supra* note 69, at 338-46 (concluding that considerations of comity and federalism, rather than the anti-injunction statute itself, governed federal court injunctions against state court proceedings during the first several decades of the nation).

137. *See* *Shapiro*, *supra* note 104, at 575 ("[Although] on appropriate occasions . . . [a court may] determine . . . [that] the ends of justice will be served best by declining to proceed . . . nothing in our history or traditions permits a court to interpret a normal grant of jurisdiction as conferring unbridled authority to hear



court must exercise principled discretion when deciding whether to enjoin duplicative proceedings.<sup>138</sup> The decision to issue an injunction should be made against the backdrop of considerations of (i) the present need for enjoining transactionally related state court proceedings and (ii) of the effect an injunction would have not only on the parties being enjoined but also on the principles of comity and federalism traditionally counseling federal restraint.<sup>139</sup>

First, then, the federal transferee court should determine whether the circumstances counsel in favor of or against enjoining duplicative state proceedings.<sup>140</sup> In making this determination, the court should examine two factors:<sup>141</sup>

1. Substantial Interference:<sup>142</sup> After reviewing all the circumstances, the court should determine whether continuation of the nonconsolidated actions would substantially impair or interfere with disposition of the consolidated actions. This prong of the test requires the court to consider:

- a. Case Progress:<sup>143</sup> Because the level of

cases simply at its pleasure.”).

138. Although some have suggested that the notion of principled discretion is oxymoronic, Professor Shapiro sharply disagrees:

I do not believe that the concept of “principled discretion” is an oxymoron. In the present context, it means that criteria drawn from the relevant statutory or constitutional grant of jurisdiction or from the tradition within which the grant arose guide the choices to be made in the course of defining and exercising that jurisdiction.

*Id.* at 578. The exercise of principled jurisdictional discretion proposed by this Comment is consistent with Professor Shapiro’s definition.

139. This exercise of principled discretion permits a federal transferee court to functionally satisfy § 5.04’s requirements that an injunction issue only if (i) the duplicative proceeding will substantially impair or interfere with disposition of the consolidated actions; and (ii) the injunction will further the fairness and efficiency objectives of the proposal. *See* COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04. Moreover, this decisional scheme also assists the court in gauging the impact of an injunction on party and state interests. *See id.*, reporter’s notes to cmt. c at 270-273; *see also supra* part III.B.

140. *See* COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04.

141. Consideration of these factors will also assist the court in framing the scope of a possible injunction. Further, analysis of these factors operates to functionally satisfy equity’s requirements that a party must show both irreparable injury and an inadequate remedy at law in order to receive injunctive relief. *See Felter v. Cape Girardeau School Dist.*, 810 F. Supp. 1062 (E.D. Mo. 1993); *Nike, Inc. v. Just Did It Enters.*, 799 F. Supp. 894 (N.D. Ill. 1992).

142. *See* COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04(a).

143. *See id.* § 5.04(b)(1); *id.* at 271; *see also* *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15-17 (1983) (suggesting that the stage of the proceedings in both the state and federal courts is relevant to the issue of whether

interference is directly related to the actual stage of litigation in both proceedings, the transferee court should determine the stage of litigation in both the federal and state courts.<sup>144</sup>

b. Issue Commonality.<sup>145</sup> The court must assess the degree to which the consolidated and nonconsolidated actions involve similar, transactionally related claims. Interference will more likely be substantial when the two proceedings involve similar issues.<sup>146</sup>

c. Numerosity & Size: The court should determine the aggregate size of the nonconsolidated action, including the number of claims and the dollar amount of the damages sought. The degree of interference is directly proportional to the overall size of the nonconsolidated proceeding.<sup>147</sup>

## 2. Advancement of Efficiency & Fairness Policies:<sup>148</sup> After measuring the scope of possible inter-

the federal court should exercise its jurisdiction); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 817-21 (1976) (same); *Thompson v. Ashner*, 601 F. Supp. 471, 474 (N.D. Ill. 1985) (same); cf. *Hicks v. Miranda*, 422 U.S. 332, 349 (1975) (holding that the *Younger* doctrine prohibits enjoining state court proceedings when the state claim arises after the federal claim and there have not been "proceedings of substance" in the federal action).

144. On the one hand, when the proceedings in both the consolidated and nonconsolidated courts are at similar stages, the possibility for interference in the disposition of the consolidated case is conceivably substantial. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 reporter's cmt. a at 264-65. On the other hand, when the proceedings in both courts are at radically different stages—as for example when the state proceeding has gone to the jury, and the consolidated action is just beginning discovery—the chance of the nonconsolidated action interfering in the disposition of the consolidated action is less likely.

145. See *id.* § 5.04(b)(2); see also *id.* reporter's notes to cmt. c at 272.

146. Moreover, analysis of issue commonality ensures that an injunction will only issue against proceedings that are transactionally related to the consolidated action. See *id.* § 5.04(a).

147. The likelihood of a nonconsolidated action impairing disposition of the consolidated action increases with the absolute size of the nonconsolidated action. A relatively large nonconsolidated action, e.g., a substantial class action or the filing of a bankruptcy petition by a tortfeasor confronted with multiple tort victims, might deprive the transferee court of an ability to effectively re-mediate and render justice for the parties in consolidated actions, thereby perpetuating the problems of complex cases the Proposal seeks to resolve. Cf. *In re Johns-Manville Corp.*, Nos. 82 B 11, 656 to 82 B 11, 676 (S.D.N.Y. filed Aug. 26, 1982) (initiating bankruptcy proceeding to resolve outstanding tort claims); *supra*, part II.A.

148. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04(a); see also *supra*

ference, the transferee court should evaluate the following factors to determine whether an injunction will promote the Proposal's efficiency and fairness objectives.<sup>149</sup>

a. Case Progress:<sup>150</sup> Efficiency and fairness policies are potentially better served when the decision to consolidate related claims and enjoin all nonconsolidated claims pending in state courts has been made at earlier, rather than later, stages of the proceedings.<sup>151</sup> The transferee court should evaluate whether the consolidated proceedings have progressed beyond the point at which significant gains in efficiency or litigant fairness might be achieved by an injunction.

b. Issue Commonality:<sup>152</sup> Efficiency and fairness policies are more likely to be advanced by consolidation—voluntary or involuntary—only when a significant number of common issues occur in both the consolidated and nonconsolidated actions. Consequently, the transferee court must evaluate the claims presented in both actions, considering both

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part II.C. (discussing policies served by the Proposal).

149. The relative importance of such considerations as efficiency and fairness is suggested by the following comment made by the Reporter to the Complex Litigation Proposal: "An antisuit injunction will be appropriate *only* when its issuance will advance the fairness and efficiency goals that underlie this complex litigation proposal . . . ." COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 reporter's notes to cmt. c at 271 (emphasis added).

150. *See id.* § 5.04 reporter's notes to cmt. c at 271-72; *see also In re Repetitive Stress Injury Cases*, 142 F.R.D. 584, 587 (E.D.N.Y. 1992) (suggesting that early consolidation maximizes beneficial resolution of claims while minimizing litigation costs).

151. In discussing the benefits accruing from consolidation, Judge Weinstein, who himself has had considerable experience with complex litigation, concluded that "[e]xperience with mass litigation indicates that courts are in the best position to minimize litigation costs and to help achieve satisfactory resolution of individual cases . . . through early consolidation." *In re Repetitive Stress Injury*, 142 F.R.D. at 587.

152. *See* COMPLEX LITIGATION PROPOSAL, *supra* note 2 § 5.04(b)(2) reporter's notes to cmt. c at 271-73; *see also id.* § 5.04, at 272; *cf.* *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (avoiding piecemeal litigation is a relevant factor when deciding whether to abstain in favor of a state court proceeding); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 818 (1976) (same); *Thompson v. Ashner*, 601 F. Supp. 471, 474 (N.D. Ill. 1985) (same).

the level of similarity and the aggregate number of such claims.<sup>153</sup>

Following examination of these factors, the court should determine whether they counsel against or in favor of enjoining the nonconsolidated proceeding. If the court concludes that an injunction would foster effective disposition of the consolidated action while promoting greater efficiency and fairness gains, it must then evaluate how an injunction would affect the nonconsolidated parties and whether principles of comity and federalism urge restraint. In answering these questions, the court should evaluate the following factors:

1. Burden of an Injunction.<sup>154</sup> The court should determine whether and to what extent an injunction would unduly burden the parties to the nonconsolidated action. Consideration of the following factors may be helpful in making this determination:

a. Stayed Nonconsolidated Proceedings: If the nonconsolidated proceeding has been stayed in favor of the consolidated action, an injunction may not need to issue, and, if issued, is unlikely to be unduly burdensome.<sup>155</sup>

b. Numerosity of Similar Issues: If the nonconsolidated proceedings share few common issues with the consolidated action, it is more likely that the burden falling on the nonconsolidated parties will outweigh any benefits that an injunction would produce for either the consolidated parties or the consolidated proceeding.

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153. Although—theoretically—the magnitude of attainable efficiency and fairness gains would increase as more transactionally related claims were consolidated, a single significant, common issue might justify the issuance of an injunction. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04 reporter's notes to cmt. c at 272.

154. Because traditional equitable principles suggest that a court should, prior to entering an injunction, balance both the benefits accruing from and the burdens arising out of an injunction, see *Charles Schwab & Co. v. Hibernia Bank*, 775 F. Supp. 800, 803 (N.D. Cal. 1987), courts should hesitate to issue injunctions whose burdens substantially outweigh their benefits. Requiring transferee courts to compare the burdens imposed on the party to be enjoined with the benefits accruing to the consolidated parties functionally satisfies the traditional equitable guideline.

155. See *United States v. Adair*, 723 F.2d 1394, 1404-05 (9th Cir. 1983), in which the Ninth Circuit concluded that a district court's continuing of its own proceedings was proper when competing state court proceedings had been stayed.

c. Party Excused from Consolidation:<sup>156</sup> If the nonconsolidated action has been brought by a party who was excused from consolidation, the transferee court should be extremely hesitant to enjoin that party's proceeding.

d. Case Progress:<sup>157</sup> The court should consider: (i) the extent to which an injunction will unduly burden a party who has already invested substantial monetary resources and time in prosecuting his case in the nonconsolidated action; and (ii) the extent to which that burden, albeit substantial, will be outweighed by benefits accruing from consolidation.

e. Forum Inconvenience:<sup>158</sup> The court should evaluate the extent to which the location of the consolidated action represents an inconvenient, burdensome forum for the nonconsolidated party, taking into account the present situs for adjudicating the party's claim, as well as the party's actual resources and the size of the party's overall claim.<sup>159</sup>

g. Party Gamesmanship: The transferee court should assess the extent to which the nonconsolidated proceeding merely represents an attempt to avoid consolidation of a transactionally related claim.<sup>160</sup>

2. Comity & Federalism Restraints:<sup>161</sup> Lastly, the

156. See COMPLEX LITIGATION PROPOSAL, *supra* note 2, § 5.04(b)(4); *id.* § 5.04 reporter's notes to cmt. c at 273.

157. See *id.* § 5.04(b)(1); *id.* § 5.04 reporter's notes to cmt. c at 271.

158. Cf. *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983) (suggesting that an inconvenient federal forum may counsel federal abstention in favor of the state court proceeding); *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 818 (1976) (same); *Thompson v. Ashner*, 601 F. Supp. 471, 474 (N.D. Ill. 1985) (same).

159. Compare *Centronics Data Computer Corp. v. Merkle-Korff Indus.*, 503 F. Supp. 168 (D.N.H. 1980), in which a federal district court stayed its own proceeding in favor of a potentially more convenient state court proceeding located in Illinois.

160. The court should be relatively free to enjoin claims refiled in state court after initial consolidation of the same claim in the federal transferee court. Cf. *Moses H. Cone*, 460 U.S. at 17-18 n.20 (noting that there is "considerable merit" to a federal court's declining to stay its proceedings when evidence suggests that the state court proceeding is reactive or vexatious in nature).

161. Because principles of comity and federalism represent fairly amorphous concepts—as compared with the more tangible factors counseling in favor of an

federal transferee court should assess whether general principles of comity and federalism, which federal courts have traditionally considered when reviewing a request for an injunction,<sup>162</sup> would restrain the issuance of an injunction:

a. Comity:<sup>163</sup> The transferee court should evaluate the extent to which enjoining nonconsolidated state court proceedings will unnecessarily trammel the principle of non-interference by one court with another, increase the level of friction between the federal and state systems, and impair harmonious relations between courts constitutionally possessing jurisdiction over the same subject matter.<sup>164</sup>

b. Federalism:<sup>165</sup> The transferee court should assess the extent to which enjoining nonconsolidated state court actions will obscure the constitutional line of demarcation between the state and federal judiciaries, undermine the constitutional independence of state courts, or otherwise impair the value and role of state courts under the Federal Constitution.<sup>166</sup>

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injunction—a court must be extraordinarily cautious when examining and weighing these factors. See Brunet, *supra* note 9, at 277 (“Efficiency principles are easy to apply; more ambiguous competing policies such as federalism and fairness are difficult to employ. In the hands of managerial judges comfortable with the increased discretion inherent in docket-reduction policies, efficiency concerns are likely to outweigh other less tangible and more subtle competing policies.”).

162. See *supra* notes 135, 136 and accompanying text.

163. See *supra* part III.A.2.

164. As with many factors employed by this proposed test, the stage of the nonconsolidated litigation proves relevant to evaluating this prong. Arguably, the farther advanced the state court proceedings, with concomitantly greater expenditures of state court resources, the greater the perceived, and perhaps actual, interference will be. When, however, the state court has barely commenced its proceedings or has stayed its proceedings in favor of the federal consolidated proceeding, the impact of an injunction on comity-based values will be more minimal.

165. See *supra* part III.A.2.

166. Measuring an injunction’s impact on fairly amorphous principles of federalism is, indubitably, difficult. Nevertheless, some relatively clear factors exist which may guide court consideration. For example, if the substantive law supplying the rule of decision is federal, the impact on federalism values will be less than if the law of decision is state based. *Cf. Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-27 (1983) (suggesting that federal courts should be

After considering the import of these factors, the court should, in an exercise of its principled discretion, determine whether to enjoin the nonconsolidated proceeding.<sup>167</sup> If the calculus weighs in favor of declining to enjoin, the court should, and properly may, decline to enjoin the nonconsolidated action.<sup>168</sup> Resolution of any doubts, of course, should be against an injunction.<sup>169</sup> The process of weighing the considerations in favor of and against issuing an injunction reconciles the two potentially conflicting interests of (i) serving the policies underlying the Proposal; and (ii) protecting the values underlying the Anti-Injunction Act.

Traditional principles of discretion over the exercise of its jurisdiction permit a federal transferee court to decline to enjoin state proceedings. Incorporating this principled discretion into the decisional schema proposed here permits a federal transferee court, when deciding whether to enjoin nonconsolidated proceedings, not only to protect principles of federalism and comity but also to promote the Proposal's overarching values of efficiency and litigant fairness.

## V. CONCLUSION

Litigating complex cases within the current adjudicatory structure produces potentially unjust results for plaintiffs and defendants, as well as transactional inefficiencies which result in wasted judicial, individual, and societal resources. As a means of alleviating these problems, the American Law Institute proposes consolidating separate claims for unified treatment of their transactionally related issues. Consolidating separate complex cases through its Complex Litigation Propos-

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reluctant to abstain when federal law provides the rule of decision). Similarly, the relative significance of either a state or federal claim in the case will assist in evaluating the possible impact on federalism values. Lastly, a court may profitably consider whether important state interests are implicated by the litigation. To the extent they are, federalism principles counsel against issuing an injunction.

167. As with most multiprong tests, the test proposed here fails to suggest whether one prong is more determinative than another. In some cases, one factor alone may be dispositive; in others, all factors may indicate the direction to be taken.

168. See *supra* notes 135, 136 and accompanying text. Similarly, if these factors counsel in favor of enjoining, the court should, and properly may, enjoin the nonconsolidated state action.

169. See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630 (1977); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engr's*, 398 U.S. 281, 297 (1970); *Bechtel Petroleum, Inc. v. Webster*, 796 F.2d 252 (9th Cir. 1986).

al, the Institute posits, will achieve the fair and efficient resolution of claims, thereby alleviating problems associated with complex litigation. However, because the contemporaneous adjudication of transactionally related claims in nonconsolidated proceedings may prevent attainment of the Proposal's objectives, transferee courts processing consolidated claims must be able to enjoin those contemporaneous and transactionally related proceedings that threaten to prevent both the effectual disposition of consolidated claims and the attainment of the Proposal's overarching efficiency and fairness objectives. Transferee courts, including federal transferee courts, then, have been authorized under the terms of the Proposal to enjoin these potentially disruptive, nonconsolidated proceedings.

However, federal courts have traditionally eschewed enjoining ongoing state court proceedings. Such restraint is mandated both by the express terms of the Anti-Injunction Act and by judicial adherence to principles of comity and federalism. The policy of non-interference promotes increased harmony among federal and state courts, and preserves the constitutional independence and significance of state courts within the federal system. Although the Proposal has structured its proposal so that antisuit injunctions fall within an exception to the Anti-Injunction Act, a federal transferee court must still consider the principles of comity and federalism when deciding whether to issue an injunction. A federal transferee court, then, must work to reconcile the distinct demands of efficiency and fairness with those of comity and federalism.

Reconciliation of efficiency and fairness objectives with principles of judicial comity and federalism avoids frustrating, on the one hand, the legitimate goal of alleviating the serious problems arising from complex litigation and, on the other hand, the constitutionally mandated autonomy of state courts. This reconciliation may be achieved through the principled exercise of judicial discretion over the grant of equitable remedies. Because federal courts possess broad discretion when deciding whether to grant an equitable remedy, a federal transferee court may use that discretion to reconcile efficiency and fairness concerns with federalism and comity interests, balancing the one against the other, when deciding whether to enjoin a nonconsolidated state court proceeding. Thus, the analysis provided by this Comment will assist a federal transferee court



to harmonize the sirens' song of efficiency and fairness with the hymn of judicial federalism and comity.

*Paul W. Werner*